

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA07-1119

KENNETH DEWAYNE EUBANKS
APPELLANT

V.

HOLLY JEAN CLEM EUBANKS
APPELLEE

Opinion Delivered April 29, 2009

APPEAL FROM THE CRAIGHEAD
COUNTY CIRCUIT COURT,
[NO. DR-2003-1013]

HONORABLE LEE FERGUS, JUDGE

AFFIRMED

COURTNEY HUDSON HENRY, Judge

Appellant Dewayne Eubanks appeals the divorce decree ending his marriage to appellee Holly Eubanks. For reversal, he challenges the circuit court's award of alimony to appellee, the court's valuation of his interest in a limited-liability company, and the court's allowance of attorney's fees to appellee. We affirm.

The parties to this appeal married in December 1982. During the marriage, appellant went to medical school and is now a board-certified neurosurgeon. Appellant is the sole shareholder in his medical group known as Spine-Arkansas. Spine-Arkansas also employs a chiropractor, Dr. Terry Barnett. Appellant, Dr. Barnett, and accountant Stan Lamb are each one-third members of a limited-liability company known as Black Dog Development, LLC (Black Dog). The three members formed Black Dog to facilitate the purchase of unimproved real estate upon which to build a clinic. In 2003, Black Dog purchased a parcel of land for \$288,000, and the land remained unimproved at the time of trial.

Prior to the parties' separation, appellee stayed at home to raise the parties' five children, three of whom have reached their majority. The parties separated in January 2003 because appellant started living with another woman, Debra West. Appellant introduced West to representatives of medical device companies, and she became a sales representative for those companies. Appellant helped West form a limited-liability company, DL Medical, through which West distributes medical devices. Although West is a regional sales representative, appellant is her only client.

Appellee filed her complaint for divorce on December 30, 2003. Appellant answered, denying the material allegations of the complaint. After the court began hearing testimony, appellee filed a supplemental third-party complaint against Spine-Arkansas, West, and DL Medical, asserting that appellant used West and the other entities to shield appellant's assets and income from appellee. The supplemental complaint sought the imposition of a constructive trust on West's income and that of the associated entities.

The trial spanned eleven days, which extended over a period of eighteen months. In the divorce decree entered on March 30, 2007, the circuit court found appellant's income to be \$171,853 per year, or \$14,321 per month, and the court ordered appellant to pay child support of \$3,007 per month. The circuit court also ordered appellant to pay appellee alimony of \$5,155 per month. The court ruled that the alimony award would not automatically cease if appellee remarried but rather that it would be reduced by fifty percent upon her remarriage. In valuing appellee's marital share in Black Dog, the court cited testimony that appellant currently owned a one-third interest in the corporation and

testimony that appellant might acquire the interest of Stan Lamb in the future. The court then referred to testimony that appellee's marital share would be worth \$30,688 if appellant retained a one-third interest and \$54,000 if appellant acquired a one-half interest. The court "split the difference" and valued appellee's share at \$42,344. The court also directed appellant to pay a \$9,000 loan received from appellee's mother. Additionally, the circuit court ordered appellant to pay \$60,000 towards appellee's attorney's fees and \$11,726 in fees for her accountant. Finally, the circuit court denied appellee's third-party complaint seeking the imposition of a constructive trust.

On April 12, 2007, appellant filed a motion for a new trial and request for specific findings of fact. In his motion for a new trial, appellant asserted that irregularities in the proceedings deprived him of a fair trial; that the circuit court's division of marital property and the awards of child support and alimony were made under the influence of passion or prejudice; that the court's rulings were clearly contrary to the evidence and the law; and that errors of law occurred at trial to which he raised objections. On April 25, 2007, appellant filed a notice of appeal from the decree of divorce. The circuit court held a hearing on appellant's new-trial motion on April 30, 2007. On May 16, 2007, the court entered an order granting the motion in part and denying the motion in part. The court reduced appellee's marital share of Black Dog to \$30,688. The court also reduced the amount of attorney's fees owed to appellee to \$45,000, and the court eliminated the requirement that appellant repay the debt to appellee's mother. In all other respects, the trial court denied the motion for a

new trial. On May 18, 2007, appellant filed an amended notice of appeal from the order addressing the motion for a new trial.

As a preliminary matter, we must first acknowledge a jurisdictional defect concerning the circuit court's order deciding appellant's motion for a new trial. Even if not raised by the parties, the question of subject-matter jurisdiction is always open, cannot be waived, can be questioned for the first time on appeal, and can be raised by the appellate court. *Zollicoffer v. Post*, 371 Ark. 263, 265 S.W.3d 114 (2007). Rule 59(b) of the Arkansas Rules of Civil Procedure requires a motion for a new trial to be filed no later than ten days after the entry of judgment. Like any motion to vacate, alter, or amend a judgment that is filed ten days after the entry of judgment, new-trial motions are deemed denied if the trial court neither grants nor denies the motion within thirty days. Ark. R. App. P.–Civil 4(b)(1). Otherwise, the trial court must decide the motion for a new trial within thirty days and enter that decision of record. *Wal-Mart Stores, Inc. v. Isely*, 308 Ark. 342, 823 S.W.2d 902 (1992). If the trial court does not enter the decision of record within thirty days, the court loses jurisdiction to act on the motion, and any order entered after thirty days is void and of no effect. *Ark. State Hwy. Comm'n v. Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992); *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Suddrick*, 49 Ark. App. 84, 896 S.W.2d 452 (1995).

In the present case, appellant timely filed a motion for a new trial on April 12, 2007. Thus, the trial court had thirty days after that date to decide the motion and enter that decision of record. This thirty-day time period expired on May 14, 2007. The trial court entered its order deciding the motion beyond this deadline on May 16, 2007. Therefore, the

order is void because the trial court lost jurisdiction to act on the motion after the expiration of thirty days. Because the motion for a new trial was deemed denied by the court's inaction, the rulings in the divorce decree stand without alteration. *Slaton v. Slaton*, 330 Ark. 287, 956 S.W.2d 150 (1997) (holding that late entry of new trial order reinstated the original order).

Turning now to the first point on appeal, appellant argues that the circuit court erred in calculating his income for purposes of setting alimony and child support. He also challenges the court's award of alimony.

Appellant initially argues that the circuit court should not have imputed any income to him. In its ruling, the circuit court determined appellant's income by starting with income of \$144,751 per year as calculated by his own accountant. The court imputed an additional \$2,258 per month, or \$27,102 of annual income to appellant to arrive at appellant's disposable income. The testimony established that West, through DL Medical, provided appellant with two credit cards used to finance trips, paid for his dental work, and provided him with a computer, among other things. Other testimony showed that appellant lived in a home owned by West and that appellant's payment of \$700 in rent to West was approximately one-third of the monthly expenses. West also gave appellant money as needed to pay bills, including his child support and alimony payments.

The payment of personal expenses by third parties can be considered income for purposes of setting child support or alimony. See *Brown v. Brown*, 76 Ark. App. 494, 68 S.W.3d 316 (2002); *Weir v. Phillips*, 75 Ark. App. 208, 55 S.W.3d 804 (2001). Likewise, the supreme court has held that a gift from a payor's grandparents, a certificate of deposit, and

retirement payments all fell within the broad range of a payor's sources of income for child-support purposes. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002). Although appellant argues that federal law prohibits a physician from benefitting financially by having a financial interest in a company that supplies medical devices utilized by the physician, *see* 42 U.S.C. § 1395nn, the circuit court correctly noted that the issue in this case is the amount of income available to appellant. The question of whether appellant violated federal law was not at issue. In the present case, we cannot say that the circuit court erred by imputing income to appellant based on the evidence showing a third-party's payment of his personal expenses.

As a further argument under this point on appeal, appellant contends that the circuit court erred in ordering the payment of lifetime alimony to appellee. The duration of alimony is within the circuit court's discretion. *See Hiett v. Hiett*, 86 Ark. App. 31, 158 S.W.3d 720 (2004). The purpose of alimony is to rectify the economic imbalances in earning power and standard of living in light of the particular facts of each case. *Kuchmas v. Kuchmas*, 368 Ark. 43, 243 S.W.3d 270 (2006). The primary factors that a court should consider in awarding alimony are the financial need of one spouse and the other spouse's ability to pay. *See id.* The circuit court may also consider other factors, including the couple's past standard of living, the earning capacity of each spouse, the resources and assets of each party, and the duration of the marriage. *See Johnson v. Cotton-Johnson*, 88 Ark. App. 67, 194 S.W.3d 806 (2004). We adhere to no mathematical formula or bright-line rule in awarding alimony. *See Kuchmas, supra; Valetutti v. Valetutti*, 95 Ark. App. 83, 234 S.W.3d 338 (2006). The circuit court may

make an award of alimony that is reasonable under the circumstances. *Kuchmas, supra*.

Contrary to appellant's argument, the record does not indicate that the circuit court awarded appellee lifetime alimony in lieu of an interest in appellant's medical practice or non-marital property, as forbidden by our decision in *Hollaway v. Hollaway*, 70 Ark. App. 240, 16 S.W.3d 302 (2000) (holding that an award of lifetime alimony was improper where it was made in lieu of giving the wife an interest in her husband's non-vested military retirement). Instead, the record shows that the trial court considered the appropriate factors in making this decision. The court considered the financial circumstances of both parties, as well as appellant's far greater earning capacity and the extent of appellee's financial need. The court also took into consideration the length of the marriage, twenty-two years, and appellee's testimony that the parties agreed she would stay at home and raise the children. The court noted appellee's lack of a college degree and appellee's absence from the job market for nearly twenty years. On this record, we cannot say that the circuit court abused its discretion by awarding lifetime alimony. See *Johnson, supra* (affirming a lifetime alimony award to wife even though she was a physician where wife stayed at home to raise the children and husband's income far exceeded her potential earnings); *Hiett, supra* (affirming lifetime alimony award where wife was relatively young and healthy, had taken college courses, but stayed home during a twenty-five-year marriage).

This brings us to consideration of the amount of the alimony award. Appellant is correct in asserting that fault or misconduct is not a factor in awarding alimony. See *Russell v. Russell*, 275 Ark. 193, 628 S.W.2d 315 (1982). However, our review of the record does

not indicate that the circuit court considered fault in assessing alimony. The circuit court considered the evidence surrounding appellee's needs and appellant's ability to pay, the lifestyle the parties enjoyed, and the other factors mentioned above in reaching this decision. In light of established precedent and the facts before us, we find no abuse of discretion.

Appellant next contends that the circuit court erred in valuing his interest in Black Dog. His argument contains two subpoints. First, he contends that the circuit court erred in allowing the testimony of an appraiser whose name had not been disclosed. Second, he argues that the methodology used by appellee's expert was flawed and not based on the fair market value of appellant's interest in Black Dog. A trial court's decision to admit evidence is within its discretion and will not be reversed absent an abuse of discretion. *Rose Care, Inc. v. Ross*, 91 Ark. App. 187, 209 S.W.3d 393 (2005). Also, a circuit court's valuation of property for purposes of property division will not be reversed unless it is clearly erroneous. *Hoover v. Hoover*, 70 Ark. App. 215, 16 S.W.3d 560 (2000).

As previously noted, this case was tried over an extended period of time. Near the end of the trial, appellee informed appellant that she intended to recall Stephen Orr, an accountant and a valuation expert, to value appellant's interest in Black Dog. She also indicated that she was going to call an appraiser to testify as to the value of the land owned by Black Dog. Appellant relies on *Arkansas State Highway Commission v. Frisby*, 329 Ark. 506, 951 S.W.2d 305 (1997), and argues that he was prejudiced because appellee did not disclose that she was going to call an appraiser to testify as to the value of the land owned by Black Dog. He also argues that, as a result, he did not hire his own expert to value the land.

Although appellant objected to the appraiser's testimony at trial, he did not move for a continuance. The supreme court has held that the failure to request a continuance under such circumstances amounts to a failure to show prejudice. *Mid-South Rd. Builders v. Ark. Contractors Licensing Bd.*, 328 Ark. 630, 946 S.W.2d 649 (1997). We will not reverse absent a showing of prejudice. *Id.*

Appellant also asserts that Orr's methodology in valuing his interest in Black Dog is flawed because he did not consider the debt Black Dog owed to Spine-Arkansas and the other assets owned by Black Dog. We have stated that a circuit court's decision adopting an expert's recommendation as to the valuation of marital property will not be reversed unless it is clearly erroneous. *Jones v. Jones*, 29 Ark. App. 133, 777 S.W.2d 873 (1989). Orr did not value appellant's interest as a member of Black Dog; instead, he valued appellant's interest in the land because the land was Black Dog's only asset. Orr also testified that he did not consider the debts Black Dog owed to Spine-Arkansas because appellant received that money as wages through Black Dog and thus was considered as income to appellant. Appellant's objection to Orr's testimony goes to the weight to be given Orr's opinion as to the value of appellant's interest in Black Dog. *See Ark. State Hwy. Comm'n v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985). The circuit court, as the fact-finder, determines the weight to be given testimony, and we conclude that the trial court's findings valuing appellant's interest in the company are not clearly against the preponderance of the evidence.

Appellant also argues that Orr previously represented that he would not offer an opinion as to appellant's interest in Black Dog. However, Orr explained that, at the time he

made this statement, appellee had not asked him to value the interest in Black Dog. When a party complains about the failure to update discovery, the matter lies within the discretion of the trial court. *Ross, supra*. Appellant did not consider the alleged discovery violation egregious enough to request a continuance. Thus, we cannot say that appellant has demonstrated any prejudice from the trial court's refusal to exclude Orr's testimony. Because we do not reverse absent a showing of prejudice, we find no abuse of discretion. *Mid-South Rd. Builders, Inc. v. Ark. Contractor Licensing Bd.*, 328 Ark. 630, 946 S.W.2d 649 (1997). See also *Hill v. Billups*, 85 Ark. App. 166, 148 S.W.3d 288 (2004) (finding no abuse of discretion in not excluding expert's testimony when expert revised his opinion).

Further, citing *Kinkhead v. Spillers*, 336 Ark. 60, 983 S.W.2d 425 (1999), appellant contends that the circuit court erred by making a division of his interest in Black Dog because the other members of the company were not joined in the lawsuit. Appellant's reliance on this decision is misplaced because *Kinkhead* is a case involving a partition, and it has no application here because the trial court was not partitioning the land. Under the divorce decree, appellant will still retain his interest in Black Dog, as will the other members. Here, the trial court determined the current value of appellant's interest in Black Dog. Therefore, it is not necessary for the other members to be before the court because their interests are unaffected by the divorce decree.

For his third and final point on appeal, appellant argues that the circuit court erred in awarding appellee a portion of her attorney's fees and the fees for her accountant. Appellant does not object to the hourly rate for appellee's counsel or to the circuit court's authority to

award expert witness fees. His argument is that appellee and her attorney spent much time and effort on theories that the circuit court ultimately rejected and, therefore, she did not prevail so as to entitle her to an award of attorney's fees.

It is settled law that circuit courts have inherent power to award attorney's fees in domestic relations proceedings. *Page v. Anderson*, 85 Ark. App. 538, 157 S.W.3d 575 (2004). Arkansas Code Annotated section 9-12-309(a) (Repl. 2008) authorizes the circuit court to award either party a reasonable attorney's fee and makes no provision for the fee to be awarded only to the prevailing party. Appellant cites no authority for the proposition that appellee had to prevail to be entitled to fees. In fact, the supreme court has allowed a wife to recover her attorney's fees in cases where the husband was granted the divorce. *See Cook v. Cook*, 233 Ark. 961, 349 S.W.2d 809 (1961); *Walls v. Walls*, 232 Ark. 638, 339 S.W.2d 430 (1960); *Laird v. Laird*, 201 Ark. 483, 145 S.W.2d 27 (1940). We thus find no merit in appellant's argument.

Turning to the amount of the fees, we cannot say that the circuit court abused its discretion in awarding appellee \$60,000 toward her attorney's fees and over \$11,000 in costs and expert witness fees. The circuit court must consider the relative financial positions of the parties in making such an award. *McKay v. McKay*, 340 Ark. 171, 8 S.W.3d 525 (2000). The circuit court made an express finding that appellant prolonged the proceedings by not cooperating during discovery, and even destroying records. Moreover, while the circuit court may not have granted appellee any relief by imposing a constructive trust on West and her company, the court imputed substantial income to appellant based on testimony arising

out of appellee's efforts. Given the factors discussed above in regard to appellee's claim for alimony, the circuit court did not abuse its discretion in awarding appellee her fees.

Affirmed.

GLOVER and BROWN, JJ., agree.